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Tahps Group Bhd v Pentadbir Tanah Daerah Raub

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-01(NCVC)(A)-158–05 OF 2015
ABDUL RAHMAN SEBLI, ZALEHA YUSOF AND MARY LIM JJCA
20 SEPTEMBER 2018

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Land Law — Acquisition of land — Award — Award by land administrator — Appeal against award — Whether appeal by appellant against amount of compensation awarded by land administrator prohibited by proviso to s 49(1) of the Land Acquisition Act 1960 — Land Acquisition Act 1960 ss 40D(3) & 49(1)

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The appellant was a registered proprietor of a piece of land located in Raub, Pahang ('the land'). A portion of the land was acquired to build a highway, resulting in the land being severed into two portions without any access between the two portions. The land administrator awarded RM2,965,365 for market value, RM714,534.41 for severance and RM238,178.12 for injurious affection. On appeal, the High Court affirmed the land administrator's award and dismissed the appellant's claim for an increase in compensation for, inter alia, severance and injurious affection. Dissatisfied with the decision, the appellant filed the present appeal. The respondent raised a preliminary objection grounded on ss 40D(3) and 49(1) of the Land Acquisition Act 1960 ('the Act'). The respondent submitted that since the appellant's appeal was against the amount of compensation awarded by the land administrator, it was prohibited by the proviso to s 49(1) of the Act.

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Held:

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(1) The doctrine of stare decisis required the court to abide by the Federal Court decisions in *Calamas Sdn Bhd v Pentadbir Tanah Batang Padang* [2018] Supp MLJ 256 and *Syed Hussain bin Syed Junid & Ors v Pentadbir Tanah Negeri Perlis and another appeal* [2013] 6 MLJ 626. Thus, the law as it stood at the time of the present court's decision was that there was a complete bar to all appeals to the Court of Appeal from the High Court on an award of compensation, which was what the appellant's appeal was concerned with. However, the Federal Court had since delivered its decision in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 ('Semenyih Jaya') where it was decided otherwise. It was held that the bar to appeal in s 49(1) of the Act was limited to issues of fact on ground of quantum of compensation. Therefore, an aggrieved party had the right to appeal against the decision of the High Court on questions of law. Section 40D(3) was struck down

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as being unconstitutional (see paras 13–15).

(2) In the face of *Semenyih Jaya*, the present court's decision to dismiss the appellant's appeal on preliminary objection, based as it was on s 40D(3) and the proviso to s 49(1) of the Act, had turned out to be wrong, and the court stand to be corrected (see para 18).

[Bahasa Malaysia summary

Perayu adalah pemilik berdaftar sebidang tanah yang terletak di Raub, Pahang ('tanah tersebut'). Sebahagian daripada tanah tersebut telah diambil semula untuk membina lebuh raya, menyebabkan tanah tersebut terputus menjadi dua bahagian tanpa akses antara dua bahagian tersebut. Pentadbir tanah menganugerahkan RM2,965,365 untuk nilai pasaran, RM714,534.41 untuk pemutusan dan RM238,178.12 untuk kesan mudarat. Atas rayuan, Mahkamah Tinggi mengesahkan award pentadbir tanah tersebut dan menolak tuntutan perayu untuk penambahan pampasan untuk, antara lain, pemutusan dan kesan mudarat. Tidak berpuas hati dengan keputusan tersebut, perayu memfailkan rayuan semasa. Responden menimbulkan bantahan awal yang didasarkan pada ss 40D(3) dan 49(1) Akta Pengambilan Tanah 1960 ('Akta'). Responden berhujah bahawa memandangkan rayuan perayu adalah terhadap jumlah pampasan yang diberikan oleh pentadbir tanah, ia dilarang oleh proviso kepada s 49(1) Akta.

Diputuskan:

(1) Doktrin stare decisis menghendaki mahkamah mematuhi keputusan Mahkamah Persekutuan di dalam *Calamas Sdn Bhd v Pentadbir Tanah Batang Padang* [2018] Supp MLJ 256 dan *Syed Hussain bin Syed Junid & Ors v Pentadbir Tanah Negeri Perlis and another appeal* [2013] 6 MLJ 626. Oleh itu, undang-undang sebagaimana yang ditetapkan pada masa keputusan mahkamah semasa diberikan ialah terdapat halangan yang menyeluruh untuk semua rayuan ke Mahkamah Rayuan dari Mahkamah Tinggi atas award pampasan, seperti yang berkait dengan rayuan perayu ini. Walau bagaimanapun, sejak itu, Mahkamah Persekutuan telah memberikan keputusannya di dalam *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 ('Semenyih Jaya') yang telah memutuskan sebaliknya. Telah diputuskan bahawa halangan untuk merayu dalam s 49(1) Akta adalah terhad kepada isu fakta berdasarkan kuantum pampasan. Oleh itu, pihak yang terkilan mempunyai hak untuk merayu terhadap keputusan Mahkamah Tinggi mengenai persoalan-persoalan undang-undang. Seksyen 40D(3) telah dibatalkan kerana tidak berperlembagaan (lihat perenggan 13–15).

(2) Di hadapan *Semenyih Jaya*, keputusan mahkamah ini untuk menolak rayuan perayu atas bantahan awal, berdasarkan kepada s 40D(3) dan proviso kepada s 49(1) Akta, telah berubah menjadi salah, dan keputusan

mahkamah ini ternyata perlu diperbetulkan (lihat perenggan 18).] A

Notes

For cases on award, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2284–2342. B

Cases referred to

Calamas Sdn Bhd v Pentadbir Tanah Batang Padang [2018] Supp MLJ 256; [2011] 5 CLJ 125, FC (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561; [2017] 5 CLJ 526, FC (refd) C
Syed Hussain bin Syed Junid & Ors v Pentadbir Tanah Negeri Perlis and another appeal [2013] 6 MLJ 626, FC (refd)

Legislation referred to D

Courts of Judicature Act 1964 s 68(1)
Federal Constitution art 13
Land Acquisition Act 1960 ss 40D(3), 49(1)

Appeal from: Land Reference No 15NCVC-19–10 of 2012 (High Court, Temerloh) E

KL Pang (ZT Chok with him) (Cheah Teh & Su) for the appellant.
Shamsulbahri bin Ibrahim (Nurul Farhana bt Khalid with him) (Pahang State Legal Advisor's Office) for the respondent. F

Abdul Rahman Sebli JCA (delivering judgment of the court):

[1] This appeal was against the decision of the High Court at Temerloh, Pahang, dismissing the appellant's claim for an increase in compensation for, inter alia, severance and injurious affection. G

[2] The undisputed facts are as follows. The appellant is the registered proprietor of the land held under Grant No 5248, Lot No 6021, Mukim Gali, District of Raub, Pahang ('the subject land') measuring 402.1129 hectares. H

[3] A portion of the subject land measuring 16.0290 hectares ('the scheduled land') was acquired to build a highway, resulting in the subject land being severed into two portions without any access between the two portions. I

[4] The land administrator awarded RM2,965,365 for market value of the scheduled land at RM185,000 per hectare, RM714,534.41 for severance and RM238,178.12 for injurious affection.

[5] On appeal, the High Court affirmed the land administrator's award for market value, and further awarded RM100,000 for disturbance and RM1m for accommodation works.

[6] The present appeal before us was against that part of the High Court decision on severance and injurious affection as well as the power of the assessors to determine the quantum of compensation.

[7] At the outset of the hearing, the respondent raised a preliminary objection, which we upheld by a unanimous decision. The appellant's appeal was accordingly dismissed with costs. Consequently, we did not hear the merits of the appellant's appeal.

[8] The respondent's preliminary objection was grounded on ss 40D(3) and 49(1) of the Land Acquisition Act 1960 ('the LAA'), which we reproduce below for ease of reference:

> Section 40D(3)
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> (3) Any decision made under this section is final and there shall be no further appeal to a higher Court on the matter.
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> Section 49(1)
>
> (1) Any person interested, including the Land Administrator and any person or corporation on whose behalf the proceedings were instituted pursuant to section 3 may appeal from a decision of the Court to the Court of Appeal and to the Federal Court:
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> > Provided that where the decision comprises an award of compensation there shall be no appeal therefrom.

[9] It was argued by learned counsel for the respondent that since the appellant's appeal was against the amount of compensation awarded by the land administrator, it was prohibited by the proviso to s 49(1) of the LAA.

[10] The respondent cited the Federal Court case of *Calamas Sdn Bhd v Pentadbir Tanah Batang Padang* [2018] Supp MLJ 256; [2011] 5 CLJ 125 where it was decided as follows:

> Coming back to s 40D(3) of the Act, I am of the view that the said section clearly stipulates that 'Any decision made under this section is final and there shall be no further appeal to a higher court on the matter'.
>
> It is trite law that courts must give effect to the clear provisions of the law and by virtue of ss 40D(3) and 49(1) of the Act, which were not ambiguous in any way, the appellant was precluded from appealing against the order of compensation issued by the trial judge.

[11] The same court in *Syed Hussain bin Syed Junid & Ors v Pentadbir Tanah Negeri Perlis and another appeal* [2013] 6 MLJ 626 came to the same conclusion as in *Calamas*.

[12] We were also referred to s 68(1) of the Courts of Judicature Act 1964 which provides:

> (1) No appeal shall be brought to the Court of Appeal in any of the following cases:
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> (2) ... ;
>
> (3) ... ;
>
> (4) ... ; and
>
> (5) where, by any written law for the time being in force, the judgment or order of the High Court is expressly declared to be final.

[13] The doctrine of *stare decisis* required us to abide by the Federal Court decisions in *Calamas* and *Syed Hussain*. Thus, the law as it stood at the time of our decision (at least to our understanding) was that there was a complete bar to all appeals to the Court of Appeal from the High Court on an award of compensation, which was what the appellant's appeal was concerned with.

[14] However, the Federal Court had since delivered its decision in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 5 CLJ 526 where it was decided otherwise. It was held that the bar to appeal in s 49(1) of the LAA is limited to issues of fact on ground of quantum of compensation.

[15] Therefore, an aggrieved party has the right to appeal against the decision of the High Court on questions of law. Section 40D(3) was struck down as being unconstitutional.

[16] The Federal Court explained that *Calamas* and *Syed Hussain* do not represent a bar to appeal against any decision of the High Court on compensation, and that even if the two cases represent a bar to appeal against any decision which comprises compensation, the Federal Court in those two cases were not invited to consider issues of constitutionality or the restrictive dimension of s 49(1) in the face of art 13 of the Federal Constitution, since it was never raised there. Instead, the issues in the two cases merely revolved around the construction of ss 40D(3) and 49(1) of the LAA.

[17] To better understand the *ratio decidendi* of *Semenyih Jaya*, we think it would be useful to cite in extenso the relevant parts of the judgment delivered by Zainun Ali FCJ, as follows:

[140] The application of sub-s 49(1) of the Act has been set out by this court in *Syed Hussain bin Syed Junid & Ors v Pentadbir Tanah Negeri Perlis and another appeal* [2013] 6 MLJ 626; [2013] 9 CLJ 152. It was held that based on sub-s 49(1), an aggrieved party has the right to appeal to the Court of Appeal and therefore to the Federal Court without having to resort to the leave process under sub-s 96(a) of the CJA (per Raus Sharif PCA).

[141] On the other hand, the proviso to sub-s 49(1) seeks to qualify a full right of appeal (which is given in the body of the section) in that there can be no appeal 'where the decision comprises an award of compensation'.

[142] The proviso should not be construed to disembody the section. A proviso has to be read as being part of the main section and not independent of it. As Viscount Dilhorne said in the Privy Council in *Commissioner of Stamp Duties v Atwill* [1973] 1 All ER 576 at p 579:

> ... It is the substance and content of the enactment, not its form, which has to be considered, and that which is expressed to be a proviso may itself add to and not merely limit or qualify that which precedes it.

'Decision Comprises An Award Of Compensation' In Subsection 49(1) Of The Act

[143] The proviso to sub-s 49(1) of the Act explicitly sets out a limitation on the content of the appeal — in that there can be no appeal 'where the decision comprises an award of compensation'.

[144] A literal reading of the proviso to s 49 of the Act would mean that there is a complete bar on all appeals to the Court of Appeal from the High Court on a question of compensation.

[145] On behalf of the respondent, the Senior Federal Counsel submitted that the language of the proviso to sub-s 49(1) is clear and unequivocal in that where the High Court's decision is grounded on compensation, no appeal can be brought against that decision. The courts must give effect to the clear provisions of the law.

[146] The above contention finds support in two decisions of the Federal Court. In *Calamas Sdn Bhd v Pentadbir Tanah Batang Padang* [2018] Supp MLJ 256; [2011] 5 CLJ 125, the Federal Court, inter alia, held that:

> ... In the instant appeal I do not see anything ambiguous in ss 40D and 49(1) of the Act. In view of this, I am of the view that the appellant is precluded from appealing against the order of compensation issued by the learned judge.

[147] A similar pronouncement was made in the case of *Syed Hussain* where His Lordship Raus Sharif PCA said:

> With the introduction of s 40D and the amendment to the proviso of s 49(1) the intention of Parliament is very clear, ie to preclude any party from appealing *against the order of compensation* made by the High Court ... (Emphasis added.)

[148] We are of the view that this purported ouster of the right of appeal in respect of compensation ought to be narrowly and strictly construed. One has to revert to the tangible weight of the wording of art 13(1) of the Federal Constitution where the safeguards are that an acquisition must be 'in accordance with law' and that the

compensation should be 'adequate compensation'. The proviso to sub-s 49(1) of the Act must be strictly interpreted in favour of the person who has been deprived of its property so as to give meaning to the constitutional protection of a person's right to his property.

[149] It is axiomatic that a right of appeal is statutory. What then is the effect of this? First, it simply means that when conferred by statute, the right of appeal becomes a vested right. Correspondingly the jurisdiction of the court to hear appeals is also conferred by statute (see *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549; [1995] 3 CLJ 485); *Wan Sagar bin Wan Embong v Harun bin Taib & Ors* [2008] 4 MLJ 473; [2008] 5 CLJ 14).

[150] A *fortiori*, the nature of the appeal depends on the terms of the statute conferring that right. It is a matter of construction to be given to the provisions conferring the right to appeal. Legislative intention can also be found by examining the legislation as a whole. Limiting the right to bring an appeal is a way of encouraging finality. If an examination of the language and policy of the Act granting the right of appeal concludes that Parliament intends to limit an appeal, the court must give effect to it.

[151] We have perused the facts and the decisions of this court in *Calamas* and *Syed Hussain*. The cases do not represent a bar to appeal against any decision of the High Court on compensation. Even if *Calamas* and *Syed Hussain* represent a bar to appeal against any decision which comprises compensation, the Federal Court in these two cases were not invited to consider issues of constitutionality or the restrictive dimension of sub-s 49(1) in the face of art 13 of the Federal Constitution, since it was never raised there. Instead, the issues in these two cases merely revolved around the construction of sub-s 40D(3) and sub-s 49(1) of the Act.

[152] In our view, what needs clarification here is the phrase 'against the order of compensation made by the High Court' which was used by the Federal Court, both in *Calamas* and *Syed Hussain*. The question is whether such expression denotes any decision issued by the High Court with regard to compensation.

[153] In our view, this does not appear to be the case. It is obvious that the subject matter of the appeals in both cases was purely on the inadequacy of quantum of compensation awarded by the High Court. It was on this basis that Hashim Yussof FCJ in *Calamas*, concluded that:

> It would appear that from the grounds of judgment of the Court of Appeal (at p 16 appeal record Vol I), the issue put forward before the court was whether the learned judge was correct in determining the *amount of compensation* to be awarded to the appellant. (Emphasis added.)
>
> ... I am of the view that the said section clearly stipulates that 'Any decision made under this section is final and there shall be no further appeal to a higher court on the matter'.
>
> It is trite law that courts must give effect to the clear provisions of the law. In the instant appeal I do not see anything ambiguous in ss 40D(3) and 49(1) of the Act. In view of this, I am of the view that the appellant is precluded from appealing against the order of compensation issued by the learned trial judge.

[154] The position is reinforced by the restrictive approach taken by the Federal Court in the interpretation of the proviso to sub-s 49(1) of the Act. In *Syed Hussain*, His Lordship Raus Sharif PCA held that because of its legislative background, the proviso to sub-s 49(1) of the Act must be read together with the provision of sub-s 40D(3) of the Act. The intention of Parliament is clear. There can be no appeal against the decision of the High Court on the amount of compensation. The relevant part of the judgment reads:

> Thus while s 49(1) of the LAA allows any interested person to appeal against the decision of the High Court to the Court of Appeal, s 40D appears to have restricted the ambit of such an appeal. Section 40D(3) clearly provides that any decision as to the amount of compensation award shall be final and there shall be no further appeal to the higher Court on the matter. This non-appealable provision of s 40D(3) is further reinforced by the proviso of s 49(1) which reads:
>
> > Provided that where the decision comprises an award of compensation there shall be no appeal therefrom.
>
> Historically speaking, s 40D is a new section introduced by the Land Acquisition (Amendment) Act 1997 (Amendment Act 1997). The Amendment Act 1997 had also, inter alia, amended the proviso of s 49(1) of the LAA.

[155] To sum up, the proviso to sub-s 49(1) of the Act does not represent a complete bar on all appeals to the Court of Appeal from the High Court on all questions of compensation. Instead, the bar to appeal in sub-s 49(1) of the Act is limited to issues of fact on ground of quantum of compensation. Therefore, an aggrieved party has the right to appeal against the decision of the High Court on questions of law.

[18] In the face of *Semenyih Jaya*, our decision to dismiss the appellant's appeal on a preliminary objection, based as it was on s 40D(3) and the proviso to s 49(1) of the LAA, has turned out to be wrong, and we stand to be corrected.

Order accordingly.

Reported by Dzulqarnain Ab Fatar